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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1322

GENE BELCHER, Petitioner

V.

THE STATE OF ALABAMA, Respondent

## PETITION FOR REHEARING

**ON**

## PETITION FOR A WRIT OF CERTIORARI

**To the Alabama Court of Criminal Appeals**

GEORGE E. TRAWICK
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Attorney for Petitioner

May 18, 1976

HOUSTON PRINTING COMPANY, DOTHAN, ALABAMA 36301

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Comes now the petitioner, Gene Belcher, by his undersigned attorney, and respectfully petitions for a rehearing, in accordance with Supreme Court Rule 58, and states as grounds therefor the following intervening circumstance of substantial or controlling effect:

1. A controlling dispositive question raised on the petition for writ of certiorari was "Whether the Alabama Court of Criminal Appeals erred in deciding Defendant was not denied due process of law when the trial court, without Defendant's consent or knowledge, moved his trial date up from March 5, 1974, on which it had been set at his arraignment, to March 4, 1974, contrary to the requirements of: Title 15, Section 316, Code of Alabama, 1940; Sections 6 and 13, Article 1, Constitution of Alabama of 1901; and Constitution of the United States, Amendments V, VI, IX, and XIV." (pages 2-3, 28-33, of the Petition For A Writ Of Certiorari).

2. In the decision sought to be reviewed, entered on March 18, 1975, the Alabama Court of Criminal Appeals held, in writing to this question, that the irregularity was waived by failure to raise at trial (page 5a, Appendix to The Petition for Writ of Certiorari).

3. Exactly one year later, on March 18, 1976, and after the petition sub judice was filed, the case of **Joiner V. State** was reported at 326 So. 2d 705, Advance Sheet 3. The Court of Criminal Appeals of Alabama held in this decision, which was entered February 3, 1976, "if arraignment occurs at a court session before trial date, counsel's presence is mandatory at each session beginning with arraignment unless the

cause is continued for attendance of counsel . . .," citing as authority **Perkins v. State,** 281 Ala 139, 199 So 2d 839; **Merritt v. State,** 50 Ala. App. 635, 282 So. 2d 74. The cited cases are authority for the necessity of counsel appearing at arraignment only. Thus, in **Joiner,** the Court of Criminal Appeals of Alabama has now extended and **made mandatory** the requirement that counsel must be present at arraignment to include **all subsequent proceedings** in a felony prosecution. Accordingly, since the entry of the decision in the case sub judice, the Court of Criminal Appeals of Alabama has moved from the position of holding the entry of an order changing the trial dates as set on arraignment in the absence of defendant and his attorney is waived unless objected to at trial to now holding that presence of counsel at the arraignment and each session thereafter is mandatory, except to enter continuances because of the absence of counsel.

4. Also, In **Joiner,** supra, the Court of Criminal Appeals of Alabama reviewed the entire record of the case then before it and the effect of its decision is that the record must reflect the presence of counsel at each session beginning with and after arraignment. The sub judice record does not reflect the presence of either the petitioner Belcher or his counsel at the time the date of his trial was moved up from the date upon which it had been set at his arraignment, without his knowledge or consent, and the State in its brief did not contest the fact that there was no such presence.

5. It is believed and insisted by petitioner, therefore, that **Joiner,** supra, is an intervening circumstance of substantial or controlling effect within the meaning and in accordance with the examples reflected in Supreme Court Rule 58 (2).

BLEED THROUGH

6. Clearly, in the case sub judice, the State Court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court, in that petitioner's right to counsel has been infringed upon: **Gideon v. Wainwright,** 372 U. S. 335, 9 L ed 2d 799, 83 S Ct. 792, 93 ALR 2d 733. This denial, at a crucial stage of the proceedings, at which the Court of Criminal Appeals now belatedly holds the presence of counsel mandatory, denied petitioner due process, equal protection and the right to a complete transcript on appeal contrary to **Edwards v. United States,** 374 F 2d 24, certiorari denied, 88 S Ct. 48, 389 U. S. 850, 19 L. ed. 2d 120. In its brief, the State of Alabama contended that these rights had been waived, and the State Court had so held. Now, in the intervening **Joiner** decision, the right to presence of counsel at the session where the date of defendants trial was changed has been held mandatory in Alabama, bringing the procedural decisions in Alabama back in line with the requirements of the organic law and previous Alabama decisions the protection of which petitioner insisted upon but has been denied in the case sub judice.

7. We respectfully submit that the **Joiner** decision is such an intervening circumstance as to entitle petitioner to rehearing on this question, and we respectfully pray that a rehearing be granted to the end that petitioner will be given the protection of this subsequent case.

Respectfully submitted this the 18th day of May, 1976.

George E. Trawick,
Attorney for Petitioner

## CERTIFICATE OF COUNSEL

I hereby certify, in compliance with Supreme Court Rule 58, that the foregoing petition is presented in good faith and not for delay and that the petition is restricted to the grounds specified in said rule.

Submitted this the 18th day of May, 1976.

George E. Trawick,
Attorney for Petitioner

## PROOF OF SERVICE

I, George E. Trawick, a member of the Bar of the United States Supreme Court, do hereby certify that I have served the foregoing petition for rehearing on Honorable William Baxley, Attorney General of Alabama, and attorney of record for the State in this cause by mailing same to him by United States Mail, first-class postage pre-paid, addressed to him at his office in the Capitol, Montgomery, Alabama, on this the 18th day of May, 1976.

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